

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

MARK BURRIS, LOUISE GRIDER, and LILLA SMYTHE,
Petitioners,
v.

FIRST FINANCIAL CORPORATION and
HOME OWNERS FUNDING CORPORATION OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENT HOME OWNERS
FUNDING CORPORATION OF AMERICA
IN OPPOSITION

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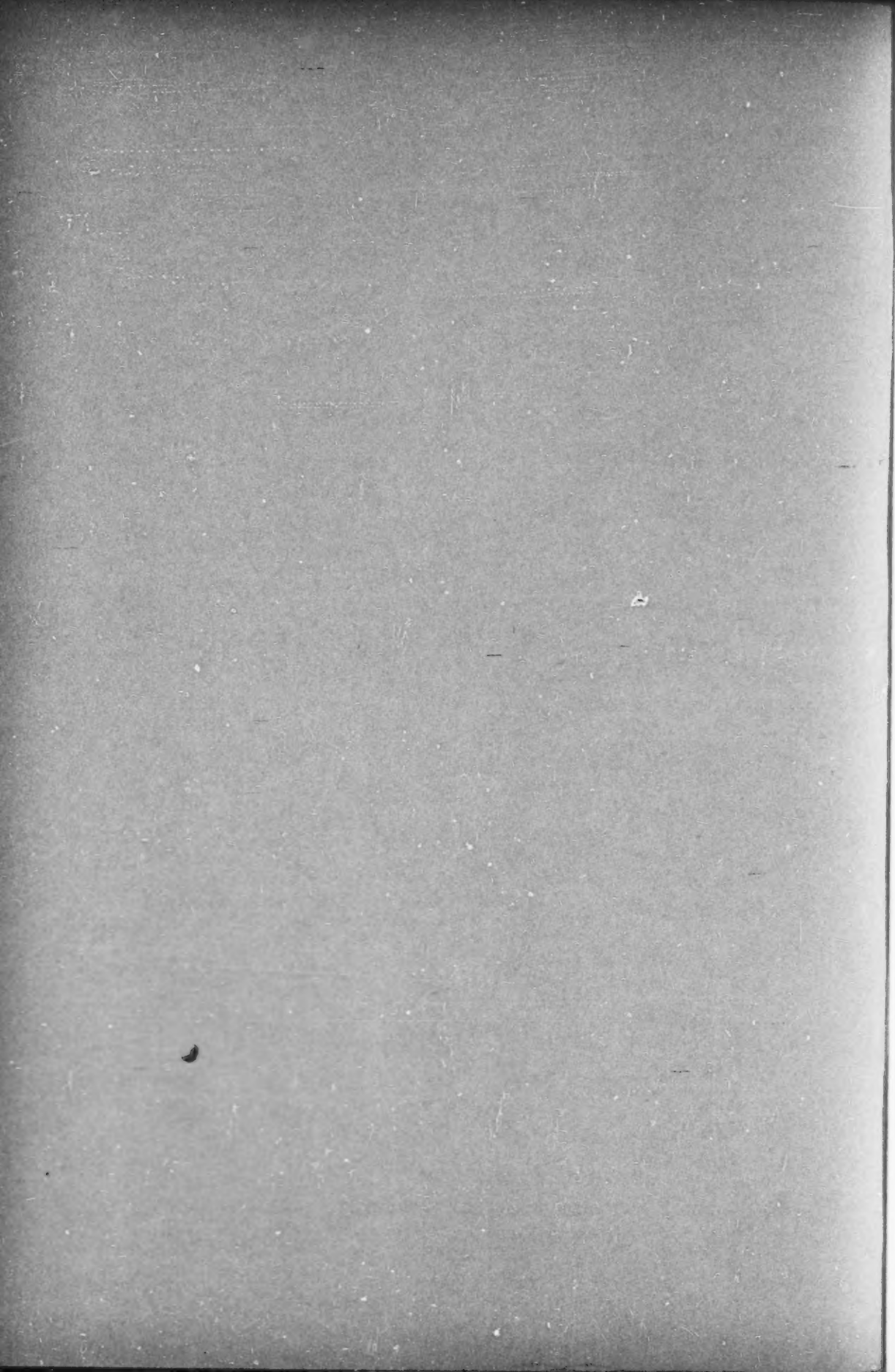
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DATED: September, 1991



QUESTION PRESENTED

Whether the Eighth Circuit's construction of an amendment to the Arkansas Construction conflicts with the decision of the Arkansas Supreme Court in *Bishop v. Linkway Stores, Inc.*, 280 Ark. 106, 655 S.W.2d 426 (1983).

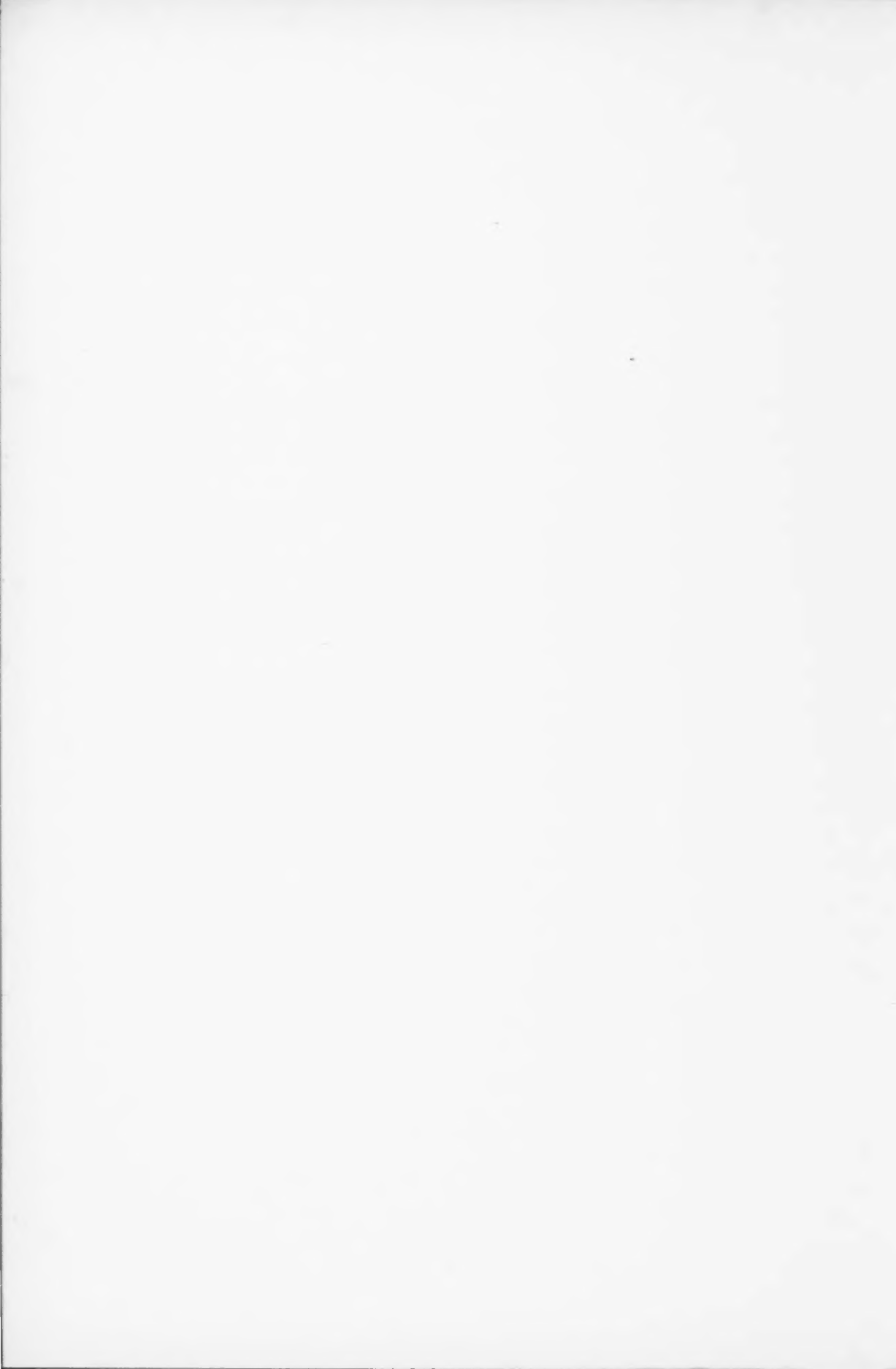


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FIRST FINANCIAL CORPORATION and
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**BRIEF OF RESPONDENT HOME OWNERS
FUNDING CORPORATION OF AMERICA
IN OPPOSITION**

STATEMENT OF THE CASE ¹

Petitioner Mark Burris filed a putative class action against respondents First Financial Corporation ("First Financial") and Home Owners Funding Corporation of America ("HOFCA") on June 30, 1988 in the United States District Court for the Eastern District of Ar-

¹ The parties to the proceedings before the United States Court of Appeals to the Eighth Circuit are Mark Burris, Louise Grider, Lilla Smythe, First Financial Corporation and Home Owners Funding Corporation of America. HOFCA is a wholly-owned subsidiary of Knutson Mortgage Corporation, which is a wholly-owned subsidiary of Home Owners Savings Bank, F.S.B. Home Owners Savings Bank was placed in receivership by the Resolution Trust Corporation.

kansas. Petitioner Burris alleged that his mobile home retail installment contract, which the Veterans Administration (the "VA") had guaranteed, violated the interest limitations of the Arkansas Constitution. First Financial and HOFCA filed motions to dismiss or in the alternative for summary judgment on August 22, 1988 on several grounds including that the federal statutory law governing VA-guaranteed loans, codified at 38 U.S.C. § 1828 and 12 U.S.C. § 1735f-7, preempted Arkansas usury law.

Petitioner Burris' contract was assigned to the Government National Mortgage Association ("GNMA") by First Financial prior to the institution of this action. HOFCA currently subservices the loan for the benefit of GNMA.

After Respondents filed their motion to dismiss, Petitioner Burris amended his Complaint to add as named plaintiffs Petitioners Louise Grider and Lilla Smythe. First Financial and HOFCA then renewed their motions to dismiss the Amended Complaint in its entirety. In addition to the federal preemption grounds asserted in its original motion to dismiss, HOFCA sought dismissal of the claims asserted by Petitioners Grider and Smythe based on the uncontroverted fact that HOFCA had absolutely no dealings with those parties at any time. Petitioners Grider and Smythe have conventional loans not held by GNMA and not serviced by HOFCA.

On March 22, 1990 the District Court granted Respondents' motions to dismiss. *Burris v. First National Corp.*, 733 F. Supp. 1270 (E.D. Ark. 1990) ("*Burris I*"). The District Court dismissed all of Burris' claims against both Respondents on the ground that federal law governing VA-guaranteed loans preempts Arkansas usury law. The District Court also granted HOFCA summary judgment on the claims of Petitioners Grider and Smythe because HOFCA never serviced, owned, held or received any interest in those parties' loan contracts. Finally, the Dis-

trict Court dismissed the claims of Grider and Smythe against First Financial on the ground that § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") also preempts Arkansas usury law in this case.

On April 23, 1990 Petitioners filed an appeal with the United States Court of Appeals for the Eighth Circuit. Following briefing and argument the Court of Appeals affirmed in all respects the District Court Order dismissing the Amended Complaint. *Burris v. First National Corp.*, 928 F.2d 797 (8th Cir. 1991) ("*Burris II*"). On May 7, 1991 the Court of Appeals denied Petitioners' petition for rehearing. The Petition to this Court followed.

REASONS FOR DENYING THE WRIT

THE EIGHTH CIRCUIT'S DECISION IS A CORRECT APPLICATION OF SETTLED CASE LAW INTERPRETING CLEAR STATUTORY LANGUAGE, AND IT CREATES NO CONFLICT WITH ANY DECISION OF THE ARKANSAS SUPREME COURT

Only one of the three questions presented by Petitioners to this Court is pertinent to the Eighth Circuit's decision to uphold the dismissal of claims against HOFCA. That question, denominated number one in the Petition, alleges that a split in authority exists regarding the preemption of Arkansas state usury law by federal statutes regulating VA-guaranteed loans. This purported conflict between the Eighth Circuit and the Arkansas Supreme Court is the only basis on which Petitioners seek a writ of certiorari concerning the Eighth Circuit's affirmance of the dismissal granted to HOFCA. Respondent HOFCA therefore limits this Response to a discussion of that issue.

The purported conflict simply does not exist. The Eighth Circuit's decision is wholly consistent with the Arkansas Supreme Court opinion in *Bishop v. Linkway Stores, Inc.*, 280 Ark. 106, 655 S.W.2d 426 (1983), as

well as with decisions in the federal courts. Moreover, the decision is supported by the plain language of applicable statutes and unambiguous case law. Thus, the Petition fails to present any issue that merits this Court's review.

The preemption issue considered by the Eighth Circuit involved the operation of certain federal preemption statutes, codified at 38 U.S.C. § 1828 and 12 U.S.C. § 1735f-7. These federal statutes preempt state usury laws concerning VA loans unless states override that preemption by subsequent legislative action. *See Doyle v. Southern Guaranty Corp.*, 795 F.2d 907, 914 (11th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (“[W]hen a state reenacts or raises its usury-limit on a particular class of loans, it overrides the FHA and VA preemptions for that type of loan *in the absence of a contrary statement.*” (emphasis added)).

The Eighth Circuit dismissed Petitioner Burris' claims because it determined that Arkansas did not override those federal statutory provisions when it adopted Amendment 60 to the Arkansas Constitution, Ark. Const., Art. 19, § 13.² Indeed, rather than overriding preemption, Amendment 60 expressly preserves federal preemption, providing that it is “not intended and shall not be deemed to supersede or otherwise invalidate any provisions of federal law applicable to loans or interest rates including loans secured by residential real property.” Ark. Const., Art. 19, § 13(d)(ii); *Burris II*, 928 F.2d at 800. Thus, the Eighth Circuit held that Amendment 60 does not override federal preemption because it does not constitute a “provision of law of [Arkansas] limiting the rate or amount of interest, discount points, or other charges on any [VA-guaranteed] loan, mortgage, or advance.” 12 U.S.C. § 1735f-7(b); *Burris II*, 928 F.2d at 800.

² Arkansas' usury prohibitions are set forth in the state constitution.

The Eighth Circuit's construction of Amendment 60 below is consistent with its opinion in other usury law preemption cases presented to it. In *In re Lawson Square Inc.*, 816 F.2d 1236, 1240 (8th Cir. 1987), the Eighth Circuit held that Amendment 60 preserves preemption under § 501 of DIDMCA. That conclusion was reaffirmed by the Eighth Circuit in *M. Nahas Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608 (8th Cir. 1991) (Amendment 60 not intended to override DIDMCA). The decision by the Eighth Circuit in this action is not in conflict with either of these decisions.

Petitioners incorrectly assert that the holding by the Eighth Circuit below conflicts with the Arkansas Supreme Court opinion in *Bishop v. Linkway Stores, Inc.*, 280 Ark. 106, 655 S.W.2d 426 (1983). *Bishop* did not involve federal preemption, but rather addressed the question of which of two state law usury limits is generally applicable to consumer loans and credit sales in Arkansas. The Arkansas Supreme Court held that paragraph (a) (i) of Amendment 60 established an interest ceiling for consumer loans even though paragraph (b) of that law established another, potentially higher limit. *Bishop*, 655 S.W.2d at 429. The federal preemption language in paragraph (d) (ii) to Amendment 60 was not at issue in *Bishop*, and the Court did not address it.

Bishop does not conflict with the Eighth Circuit's decision in this case. Contrary to Petitioner's argument, *Bishop* does not "render the provisions of subsection (d) ineffectual;" that conclusion is incorrectly based upon the exaggerated claims of the dissent in *Bishop*. See *Bishop*, 655 S.W.2d at 430. Rather, *Bishop* stands for the simple proposition that "when a constitutional amendment or a statute is plain and unambiguous, there is no room left for judicial construction." *Id.* at 428. If the majority decision in *Bishop* is at all relevant to this case, it supports the Eighth Circuit's decision to interpret the clear

and unambiguous language of Amendment 60 as not superseding or invalidating federal preemption.

CONCLUSION

Because no conflict exists between the interpretation given to Amendment 60 by the Arkansas Supreme Court and by the Eighth Circuit, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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